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DISPATCHED BY Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Review of the Pioneer's ) ET Docket No. 93-266  
Preference Rules )

### **THIRD REPORT AND ORDER**

Adopted: June 6, 1995;

Released: June 8, 1995

By the Commission:

## **I. INTRODUCTION**

1. This Third Report and Order (Third R&O) addresses proposals set forth in the Further Notice of Proposed Rule Making (Further Notice)<sup>1</sup> in this proceeding and modifies certain rules regarding our pioneer's preference program pursuant to recent legislation. The pioneer's preference program provides preferential treatment in our licensing processes for parties that make significant contributions to the development of a new service or to the development of a new technology that substantially enhances an existing service.

## **II. BACKGROUND**

2. The Further Notice proposed rules in response to the pioneer's preference directives contained in the legislation implementing domestically the General Agreement on Tariffs and Trade (GATT),<sup>2</sup> as well as on our own motion. The GATT legislation requires any licenses awarded pursuant to our pioneer's preference program in services in which competitive bidding is used to pay 85 percent of the average price paid for comparable licenses.<sup>3</sup> This

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<sup>1</sup> See Second Report and Order and Further Notice of Proposed Rule Making, ET Docket No. 93-266, 10 FCC Rcd 4523 (1995) (petition for reconsideration pending).

<sup>2</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994), to be codified at 47 U.S.C. § 309(j)(13) (GATT legislation).

<sup>3</sup> 47 C.F.R. § 309(j)(13)(B).

payment may be made in a lump sum or in installment payments over a period of not more than five years.<sup>4</sup> The GATT legislation, including the payment requirement, applies to any license issued on or after August 1, 1994 pursuant to a pioneer's preference award.<sup>5</sup>

3. The legislation also directs the Commission to prescribe regulations specifying the procedures and criteria to "evaluate applications for preferential treatment in its licensing processes (by precluding the filing of mutually exclusive applications) for persons who make significant contributions to the development of a new service or to the development of new technologies that substantially enhance an existing service."<sup>6</sup> The legislation requires the pioneer's preference regulations to include: 1) procedures and criteria by which the significance of a pioneering contribution will be determined, after an opportunity for review and verification by experts not employed by the Commission; and 2) such other procedures as may be necessary to prevent unjust enrichment by ensuring that the value of a pioneering contribution justifies any reduction in the amounts paid for comparable licenses.<sup>7</sup> The regulations issued pursuant to this legislation must be prescribed not later than 6 months after enactment of the GATT legislation (i.e., by June 8, 1995), shall apply to pioneer's preference applications accepted for filing after September 1, 1994,<sup>8</sup> and must cease to be effective on September 30, 1998, when the pioneer's preference program sunsets.<sup>9</sup>

4. In the Further Notice, we tentatively concluded that, with the exceptions of the two areas specifically addressed by the GATT legislation, the existing pioneer's preference rules, as modified by the Second Report and Order, comply with the GATT legislation's requirement to specify procedures and criteria by which to evaluate pioneer's preference applications. However, we solicited comment regarding any alternatives to any aspects of these rules that might better achieve the objectives of the GATT legislation.<sup>10</sup>

5. With respect to the two areas specifically set forth in the GATT legislation, we noted that the GATT legislation's directive that the Commission establish a procedure for review and verification by outside experts was contemplated as an optional measure by our current pioneer's preference policies, but that such "peer review" was not mandatory. We

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<sup>4</sup> Id. § 309(j)(13)(C).

<sup>5</sup> Id. § 309(j)(13)(G).

<sup>6</sup> Id. § 309(j)(13)(D).

<sup>7</sup> Id. § 309(j)(13)(D)(i), (ii).

<sup>8</sup> Id. § 309(j)(13)(D)(iii).

<sup>9</sup> Id. § 309(j)(13)(D)(v), (F).

<sup>10</sup> Further Notice at ¶ 38.

therefore proposed to formalize this policy pursuant to the GATT legislation to provide an opportunity for review of potentially pioneering proposals by experts in the radio sciences who are not Commission employees. We sought comment on whether such review by outside experts should be required in all cases or whether pioneer's preference applicants (or other interested parties) should be given only an opportunity for such review, which may be either accepted or declined by the applicants.<sup>11</sup> We tentatively concluded that we would establish a peer review process on a permanent basis. We therefore proposed to delegate to the Chief of the Office of Engineering and Technology ("Chief, OET") the authority to select a panel of experts consisting of persons who are knowledgeable about the specific technology set forth in a pioneer's preference request. In addition, while we sought comment on two possible interpretations of Section 309(j)(13)(D)(i) of the GATT legislation, which concerns possible conflicts of interest of such experts, we proposed appointing experts who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. Based on our experience with the pioneer's preference program, we tentatively concluded that the outside expertise required to evaluate the claims made in pioneer's preference requests will vary greatly. Accordingly, we proposed that our staff evaluate on a case-by-case basis how much outside assistance is required and that the Chief, OET select experts from all available sources after reviewing the proposed new technology or service.<sup>12</sup>

6. We further proposed that the experts generally be granted a period of up to 180 days to present their findings to the Commission. We sought comment on whether we should generally seek the experts' individual opinions or their consensus (as a Federal Advisory Committee under the Federal Advisory Committee Act). We tentatively concluded that the Commission should not be bound to follow the recommendations of the panel, but that it should evaluate the recommendations in light of all the submissions and comments in the record. However, we solicited comment on whether the views of the panel (especially where consensus is reached) should be entitled to greater, or perhaps controlling, deference. We also sought comment on what restrictions, if any, the panel members should have vis-a-vis contact with the applicants; e.g., whether they should have authority to seek further information pertaining to the preference request or to perform field evaluations. Finally, we sought comment on any additional conflict of interest requirements (e.g., related to financial interests) we should impose upon outside experts.<sup>13</sup>

7. With respect to the second area addressed by the GATT legislation, we stated in the Further Notice that our concerns about unjust enrichment are lessened by the statutorily-mandated payment requirement for pioneer's preference grantees in auctionable services and

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<sup>11</sup> Id. at ¶ 39.

<sup>12</sup> Id. at ¶ 41.

<sup>13</sup> Id. at ¶ 42.

the formula for calculating per capita bid amounts.<sup>14</sup> Nonetheless, we stated that we remain concerned about the effect of competitive bidding on the pioneer's preference program. We sought comment on a more stringent showing by a preference applicant in a service in which licenses are awarded by competitive bidding. Specifically, we sought comment on whether the applicant should have to demonstrate that our public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license. We also sought comment on whether in its pioneer's preference request each applicant should make a demonstration regarding possible loss of intellectual property protection to ensure that it will retain its eligibility for a preference.

8. With regard to determining which licenses are most reasonably comparable under Section 309(j)(13)(B)(i) of the GATT legislation, in the Further Notice we sought comment on any standards for comparing licenses and for excluding anomalous licenses that we might incorporate into our rules along with the statutory formulas for determining the average per capita bid amount and the payment amount. We also sought comment on the implementation of the installment payment provision in Section 309(j)(13)(C). We tentatively concluded that we would not adopt any installment payment scheme that includes royalty payments. We further sought comment on whether eligibility for installment payments should be limited to small businesses or other entities as we have done in our general auction rules. We proposed that, if an entity receiving a pioneer's preference award and license in a particular service would be eligible for installment payments in the auction for that service, that entity would be able to pay for its pioneer's preference license in installments under similar terms and conditions. Finally, we proposed to require a pioneer's preference licensee that is not eligible for installment payments to pay in one lump sum within a reasonable time (e.g., 30 days) after the auction for comparable licenses has concluded or after the license grant becomes final, whichever is later.<sup>15</sup>

9. In accord with the GATT legislation, we proposed to sunset the pioneer's preference program on September 30, 1998. We requested comment on the utility of the program, particularly in light of our competitive bidding authority. Additionally, we proposed on our own motion to modify our pioneer's preference rules by limiting the award of preferences to services in which a new allocation of spectrum is required.<sup>16</sup>

10. Finally, we proposed to apply the rules adopted in response to the Further Notice to any pioneer's preference requests granted after adoption of those rules, regardless of when the requests were accepted for filing, except in proceedings in which tentative pioneer's

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<sup>14</sup> Id. at ¶ 43, citing 47 U.S.C. § 309(j)(13)(B).

<sup>15</sup> Id. at ¶ 49.

<sup>16</sup> Id. at ¶¶ 50-51.

preference decisions have been made.<sup>17</sup>

### III. DISCUSSION

11. Only two parties filed comments on the Further Notice, and no party filed reply comments. Satellite CD Radio, Inc. (CD Radio) states that the Commission should grant pioneer's preferences for "regulatory as well as technical innovation."<sup>18</sup> According to CD Radio, one of the benefits of the pioneer's preference program is to place the entity that expended resources to achieve a spectrum allocation for a new technology on an even footing with other entities that sought licenses for their products after the spectrum had been allocated. CD Radio asserts that "[t]echnical innovation is important, but not the exclusive basis for awarding a preference."<sup>19</sup> It also states that it "believes that the policies in favor of preferences apply with equal or greater force for those services where mutual exclusivity is absent and licenses are not assigned via auction," and it "recommends that pioneer's preferences be extended to non-mutually exclusive proceedings."<sup>20</sup> Specifically, CD Radio proposes that we offer regulatory inducements, such as a guarantee of a license, reduced filing fees, or reduced annual licensing fees to pioneering entities. Finally, CD Radio states that "identifying a company as an innovator and pioneer -- and guaranteeing it a license -- provides potential investors with the appropriate signals that permit more accurate assessment of regulatory risk."<sup>21</sup> CD Radio contends that if a pioneer is identified at an early enough stage, it may be provided with the capital needed to develop a service.

12. Omnipoint Communications, Inc. (Omnipoint) addresses payment measures for small business pioneers in services in which licenses are awarded by competitive bidding. It argues that we should provide: 1) payment terms that are more attractive than the terms offered to designated entities or entrepreneur-band applicants, so that small business pioneers

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<sup>17</sup> Further Notice at ¶ 52. At the time we initiated the pioneer's preference review proceeding, Tentative Decisions, but not Orders, had been made in three proceedings. See Further Notice at n. 7. There are also 13 pioneer's preference requests pending in other proceedings. Twelve of these requests were listed in the Further Notice; *id.* at n. 46. An additional pending pioneer's preference request was inadvertently omitted from the list. This request, for a New Hybrid Personal Communications Network Service, was filed by CELSAT, Inc. on February 10, 1992, and was placed on public notice March 9, 1992 (PP-28 in RM-7927). CELSAT filed an amendment to its request on December 22, 1993.

<sup>18</sup> CD Radio Comments at 1, 5-7.

<sup>19</sup> Id. at 6.

<sup>20</sup> Id. at 7-8.

<sup>21</sup> Id. at 9.

have an incentive to take on the risks of innovation; and 2) the use of an installment plan with principal and accrued-interest obligations deferred until the end of a five-year period. Omnipoint maintains that small businesses will face extreme challenges in raising capital for license payments, and that small business non-pioneers will compete directly in the service market with small business pioneers. Omnipoint argues that it is unfair to require a small business pioneer to pay a relatively greater amount than is paid by its non-pioneer competitors who may be designated entities. Rather, Omnipoint asserts that a small business pioneer should be guaranteed lower payments than designated entity licensees. Moreover, Omnipoint recommends that we adopt a five-year deferred installment payment mechanism for the small business pioneer. Under this plan, the pioneer would face a single payment at the end of five years, comprising both principal and accrued interest. According to Omnipoint, this plan would allow the pioneer to focus resources on the cost of build-out and further research and development early in its license term. Omnipoint asserts that such a deferred installment payment plan is consistent with statutory payment directives, including Section 309(j)(13)(C) of the GATT legislation.<sup>22</sup>

13. With respect to CD Radio's statements regarding regulatory innovation, our pioneer's preference rules already incorporate non-technical or regulatory aspects. Section 1.402(a) states, inter alia: "Each preference request must contain pertinent information concerning a description of the service to be provided, the applicant's plan for implementing the service, the frequencies it proposes to use, and the area for which the preference is sought, and must address any conflicting licensing rules, showing how these rules should or should not apply." We, therefore, find no need to amend our pioneer's preference rules in this regard.

14. With respect to CD Radio's proposals regarding awarding other types of preferences in services where mutually exclusive situations do not exist and where competitive bidding is not authorized, we believe that a preference, beyond a guaranteed license and a 15 percent discount in auctioned services, would be unnecessary and contrary to the stated purpose of the pioneer's preference program. In adopting the pioneer's preference procedures, the Commission sought to foster the development of new services and to improve existing services by reducing the delays and risks for innovators associated with the Commission's licensing processes as they existed at that time.<sup>23</sup> In particular, the Commission was concerned that an innovator facing a lottery or comparative hearing had no assurance of receiving a license and therefore no confidence in its ability to obtain a license as a reward

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<sup>22</sup> Section 309(j)(13)(C) states that the Commission shall require pioneer's preference recipients to pay the sum required by the GATT payment formula in a lump sum or in guaranteed installment payments, with or without royalty payments, over a period of not more than 5 years.

<sup>23</sup> Id. at 3488.

for its efforts.<sup>24</sup> Thus, we decided to offer a significant reward in the form of a dispositive licensing preference to encourage innovators to present proposals for new technologies and services to the Commission in a timely manner. In crafting the appropriate preference, our intention was to assure innovators that they would be able to obtain licenses so as to implement their innovations. Applicants facing no mutually exclusive applications run no risk of not receiving licenses, assuming they are qualified, so we did not contemplate that any preferences would be needed to serve the public interest purposes of the pioneer's preference program.

15. CD Radio, however, suggests that additional, competition-based reasons were behind the development of the pioneer's preference rules and should be implemented here. Specifically, CD Radio argues that recognition as a pioneer and lower regulatory fees would make such an applicant more attractive to investors *vis-a-vis* its potential competitors in the service. While encouraging investors to provide financial support to innovators that would otherwise face the regulatory uncertainty of the licensing process continues to be a laudable objective of the pioneer's preference program,<sup>25</sup> we disagree with CD Radio's implication that preferences should be awarded solely to enhance a licensee's competitive edge in the investment markets and the markets for its services. Nowhere has the Commission suggested that it wished to give the preference recipient a financial or competitive advantage over other licensees.<sup>26</sup> Indeed, in rejecting proposals to give preference recipients a formal head start over other licensees, the Commission explicitly rejected that goal.<sup>27</sup> In addition, the Commission was well aware that investors may be reluctant to commit funds to an innovator of a new service when the innovator will receive no advantage over other applicants in the licensing process.<sup>28</sup> However, in adopting a flexible standard for judging when to award a preference, we stated "the financial community will generally be able to judge whether an applicant's proposal is sufficiently innovative and valuable to warrant investment, just as it is generally able to judge whether a proposed business venture in other areas is viable."<sup>29</sup>

16. With respect to Omnipoint's proposal for lower payments for small business pioneers than designated entities in services in which licenses are awarded by competitive

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<sup>24</sup> See Notice of Proposed Rulemaking, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

<sup>25</sup> See Memorandum Opinion and Order, GEN Docket No. 90-217, 7 FCC Rcd 1808, 1811 (1992).

<sup>26</sup> See Memorandum Opinion and Order on Remand, ET Docket No. 93-266 and GEN Docket No. 90-314, 9 FCC Rcd 4055, 4058 (1994).

<sup>27</sup> Report and Order, GEN Docket No. 90-217, 6 FCC Rcd at 3492.

<sup>28</sup> Id. at 3489.

<sup>29</sup> Id. at 3490.

bidding, we note that the pioneer's preference and designated entity programs are designed to meet different goals. The pioneer's preference program is designed to reward a particular entity for its innovative contributions to a new or existing service,<sup>30</sup> whereas the designated entity program is designed to promote economic opportunity and competition by disseminating licenses among a wide variety of applicants and to increase participation in spectrum-based telecommunications services by entities that lack access to substantial amounts of capital and that face economic disadvantages in obtaining licenses in a competitive bidding environment, such as small businesses.<sup>31</sup> While in some services we may determine that certain designated entities should be awarded a discount greater than the 15 percent discount that is given to a pioneer pursuant to the GATT legislation, there is an important distinction -- namely, a pioneer is guaranteed a license in the service and a designated entity is not.<sup>32</sup> Further, if a small business pioneer chooses, it may apply for a license in a service as a designated entity either in addition to or in lieu of its acceptance of a guaranteed pioneer's preference license. Accordingly, we disagree with Omnipoint that we should guarantee small business pioneers lower payments than other designated entities.

17. With respect to Omnipoint's proposal for a deferred payment plan for small business pioneers in services in which licenses are awarded by competitive bidding, consistent with the above discussion, we see no need to give such pioneers an advantage over similarly situated small businesses. We recognize that it may be financially difficult for small business pioneers to build out their systems during the first five years if at the same time they must pay 85 percent of the value of comparable licenses in a lump sum payment at the beginning of the period and compete with larger entities in the same market. However, in the Further Notice we proposed that if an entity receiving a pioneer's preference would be eligible for installment payments in the auction for that service, the entity could pay for its pioneer's preference license in installments under comparable terms and conditions to similarly situated

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<sup>30</sup> See generally Report and Order, supra n. 27; Notice of Proposed Rulemaking, supra n. 24.

<sup>31</sup> See 47 U.S.C. § 309(j)(3)(B), (4)(D). See also H.R. Rep. 111, 103d Cong., 1st Sess. 254-55 (1993); Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd. 2348, 2388-2396 (1994), on recon. 9 FCC Rcd 7245, 7256-7269 (1994).

<sup>32</sup> The discounts awarded to designated entities may vary within and among services, depending on the nature of the service. In broadband Personal Communications Services (PCS), for example, two spectrum blocks (C and F) have been designated for entrepreneurial businesses that have annual gross revenues of less than \$125 million and total assets of less than \$500 million. In these blocks, a 10 percent bidding credit is available to small businesses (less than \$40 million in annual revenues), a 15 percent credit is available to businesses owned by minorities and/or women, and a 25 percent credit is available to small businesses owned by minorities and/or women. No bidding credits or installment payments were made available on other broadband PCS blocks. See Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994), on recon. 10 FCC Rcd 403 (1995).



licensees over a period not to exceed five years.<sup>33</sup> We find this proposal adequate to address Omnipoint's concerns; accordingly, we herein adopt it. A pioneer, like other applicants, will be required in its license application to certify and make the requisite demonstration that it is eligible for installments. Other parties that are awarded pioneer's preferences in services in which licenses are assigned by competitive bidding will be required to make a single lump sum payment within 30 days after the auction for comparable licenses has concluded or within 30 days after the license grant becomes final, whichever is later.

18. No comments were filed with respect to our other proposals in the Further Notice. Because they are in the public interest and promote the goals of our pioneer's preference program and the GATT legislation, we are adopting them, as set forth in Appendix A. Specifically, with respect to peer review, we are providing an opportunity for review and verification of pioneer's preference requests by experts who are not Commission employees. We are delegating to the Chief, OET the authority to select, in appropriate cases on his/her own initiative or upon request by a preference applicant or other interested person, a panel of experts consisting of persons who are knowledgeable about the specific technology set forth in a pioneer's preference request and who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. We conclude that the best interpretation of Section 309(j)(13)(D)(i)'s conflict-of-interest language provides that there must be an opportunity for review and verification by experts who are neither employees of the Commission nor employees of any applicant seeking a pioneer's preference.<sup>34</sup> These panels will generally be granted a period of up to 90 days, but no more than 180 days, to present their findings to the Commission. We will generally establish, conduct, and seek the consensus of the panels pursuant to the Federal Advisory Committee Act,<sup>35</sup> and will evaluate their recommendations in light of all the submissions and comments in the record. Panelists will have the authority to seek further information pertaining to preference requests and to perform field evaluations, as deemed appropriate by the Chief, OET.

19. With respect to implementing the unjust enrichment provisions in Section 309(j)(13)(D)(ii), we are requiring that to qualify for a pioneer's preference in services in which licenses are awarded by competitive bidding, an applicant -- in addition to meeting our other pioneer's preference requirements -- must demonstrate that our public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license. The applicant must show that it may lose its intellectual property protection because of our public process; that the damage to its intellectual property

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<sup>33</sup> Further Notice at ¶ 49.

<sup>34</sup> In consultation with the General Counsel, the Chief, OET, shall also impose other conflict-of-interest requirements that are necessary in the interest of attaining impartial, expert advice regarding the particular pioneer's preference request or requests.

<sup>35</sup> See 5 U.S.C. Appendix 2.

is likely to be more significant than in other contexts, such as the patent process; and that the guarantee of a license is a significant factor in its ability to capture the rewards from its innovation. We will require that such a showing accompany the pioneer's preference request even if the Commission has not yet determined that the particular service for which a preference is sought will be subject to competitive bidding.

20. With respect to determining which licenses are most reasonably comparable under the pioneer's preference payment provision, Section 309(j)(13)(B)(i), no commenter addressed whether we should adopt any standards for comparing licenses and for excluding anomalous licenses. As stated in the Further Notice, we believe that the determination as to which licenses are most reasonably comparable to a pioneer's preference license must necessarily be done on a case-by-case basis. Accordingly, we will incorporate into our rules the provisions of Section 309(j)(13)(B), including the statutory formulas for determining the average "per capita bid amount" and the payment amount, and apply these provisions in each case falling under the GATT legislation's payment requirement.

21. As proposed in the Further Notice, pioneer's preference awards will be limited to services that require a spectrum allocation. As we stated in the Further Notice: "Our experience with the pioneer's preference program convinces us that awarding preferences for enhancements of existing services where no new spectrum allocation is required is contrary to the public interest. Such a policy encourages developers of a technology that can be used in a variety of existing services to apply for a pioneer's preference in each of those services."<sup>36</sup> However, we note that an entity that develops a new technology that may be used in an existing service may be able to reap significant financial benefits by patenting that technology or by selling equipment that uses that technology.

22. We proposed to apply the rules adopted in response to the Further Notice to any pioneer's preference requests granted after adoption of these rules, regardless of when the requests were accepted for filing, except in proceedings in which tentative pioneer's preference decisions have been made.<sup>37</sup> We received no comments on this matter. We find that, pursuant to authority in Section 4(i), in conjunction with Sections 1, 303(r), 307, and 309 of the Communications Act, it is in the public interest and in furtherance of our pioneer's preference policy in an auction environment to apply the rules adopted herein to pending pioneer's preference proceedings that have not reached the tentative decision stage. We also continue to find it equitable to apply new rules to these proceedings.<sup>38</sup> While each of the parties in these proceedings applied for a pioneer's preference before competitive bidding was authorized and before the GATT legislation was enacted, none of these parties has been awarded even a tentative preference. Further, we do not believe that any of these parties had

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<sup>36</sup> Further Notice at ¶ 51.

<sup>37</sup> Id. at ¶ 52.

<sup>38</sup> Id. at ¶¶ 35-36.

received the expectation of an award under existing pioneer's preference rules. Accordingly, parties with pending pioneer's preference applications on file with the Commission will have 30 days from the effective date of the rules adopted herein to amend their applications to bring them into conformance with the rules adopted herein and in the Second Report and Order in this proceeding. Failure to timely amend a pending pioneer's preference request will result in the dismissal of the request.

23. In the Second Report and Order, we stated that while the payment mechanism in the GATT legislation does not apply to pioneer's preference requests accepted for filing on or before September 1, 1994, nevertheless -- pursuant to Section 4(i) and other provisions of the Communications Act -- license charges would be imposed on any pioneer's preference license granted in proceedings in which no tentative decision had yet been made, even if the requests in such proceedings were accepted for filing on or before that date.<sup>39</sup> In addition, prior to enactment of the GATT legislation, we amended the rules (also pursuant to Section 4(i)) to impose charges on any pioneer's preference licenses granted as a result of the three pioneer's preference proceedings in which only tentative decisions had been made prior to the initiation of this pioneer's preference review rulemaking.<sup>40</sup>

24. The Second Report and Order's connection of the September 1, 1994 date and the effective date of the payment provisions in the GATT legislation was an incorrect reading of the statute. We now conclude, on further analysis, that the payment requirements in subsections 309(j)(13)(B), (C) and (E) of the Communications Act, which were enacted by the GATT legislation, apply to pioneer's preference requests relating to "any licenses issued on or after August 1, 1994,"<sup>41</sup> regardless of when the pioneer's preference requests were accepted for filing. The September 1, 1994 date applies only to the regulations required by subsection 309(j)(13)(D). Accordingly, we determine that, while the new regulations prescribed here (regarding criteria, peer review and unjust enrichment), pursuant to subsection 309(j)(13)(D), will not apply in the proceedings in which tentative decisions have been made, pursuant to the

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<sup>39</sup> Second Report and Order at ¶ 20.

<sup>40</sup> See Memorandum Opinion and Order on Remand, *supra* n. 26. Of these three pending proceedings, CC Docket No. 92-297 (28 GHz Local Multipoint Distribution Service proceeding) is the only one that has not yet been subject to a Commission Order granting or denying pioneer's preferences. In GEN Docket No. 90-314 (2 GHz broadband PCS proceeding), the Commission awarded pioneer's preferences and, in a separate licensing proceeding, granted conditional licenses pursuant to the GATT legislation. See Third Report and Order, 9 FCC Rcd 1337 (1994), *modified*, Memorandum Opinion and Order on Remand; see also Memorandum Opinion and Order, 10 FCC Rcd 1101 (1995) (granting conditional licenses). In ET Docket No. 92-28 (above 1 GHz low-Earth orbit satellite proceeding), the Commission declined to award any pioneer's preferences. See Second Report and Order, 10 FCC Rcd 3406 (1995).

<sup>41</sup> 47 U.S.C. § 309(j)(13)(G).

plain language of the GATT legislation's effective date provision, the payment provisions of the GATT legislation will apply to any and all licenses ultimately issued in the future resulting from a pioneer's preference, including any license based on a preference granted in CC Docket No. 92-297.

25. Finally, pursuant to the GATT legislation, we will terminate the pioneer's preference program on September 30, 1998.

#### **IV. PROCEDURAL INFORMATION**

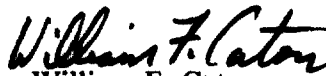
##### **A. Regulatory Flexibility Act**

26. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the expected impact on small entities of the rules adopted in this document. The FRFA is set forth in Appendix B. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1988).

##### **B. Ordering Clause**

27. Accordingly, IT IS ORDERED that Parts 0 and 1 of the Commission's Rules ARE AMENDED as specified in Appendix A, effective 60 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157(a), 303(c), 303(f), 303(g), 303(r), and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

## **Appendix A -- Final Rules**

Parts 0 and 1 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

### **PART 0 -- COMMISSION ORGANIZATION**

1. The authority citation for Part 0 continues to read as follows:

**AUTHORITY:** Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.241 is amended by adding new paragraph (f) to read as follows:

#### **Section 0.241 Authority Delegated.**

\* \* \* \* \*

(f) The Chief, Office of Engineering and Technology (OET) is authorized to select, in appropriate cases on his/her own initiative or upon request by a pioneer's preference applicant or other interested person, a panel of experts consisting of persons who are knowledgeable about the specific technology set forth in a pioneer's preference request and who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. In consultation with the General Counsel, the Chief, OET, shall also impose other conflict-of-interest requirements that are necessary in the interest of attaining impartial, expert advice regarding the particular pioneer's preference request or requests.

### **PART 1 -- PRACTICE AND PROCEDURE**

1. The authority citation for Part 1 continues to read as follows:

**AUTHORITY:** Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.402 of this chapter is amended by revising the first sentence of paragraph (a); deleting paragraph (b); revising paragraph (g) and redesignating it as new paragraph (f); redesignating paragraphs (c), (d), (e), (f), and (h) as new paragraphs (b), (c), (d), (e), and (j) respectively; and adding new paragraphs (g), (h), (i), and (k) to read as follows:

#### **Section 1.402 Pioneer's Preference.**

(a) When filing a petition for rule making pursuant to § 1.401 of this part that seeks an allocation of spectrum for a new service or that, by use of innovative technology in a new

spectrum allocation, will substantially enhance an existing service, the petitioner may also submit a separate request that it be awarded a pioneer's preference in the licensing process for the service. \* \* \*

\* \* \* \* \*

(f) In services in which licenses are assigned by competitive bidding, any parties receiving pioneer's preferences will be required to pay for their licenses in accord with the payment formula specified in the General Agreement on Tariffs and Trade legislation, Pub. L. No. 103-465. This formula requires that pioneers pay in a lump sum or in installment payments over a period of not more than five years 85 percent of the average price paid for comparable licenses. Comparable licenses will be determined by the Commission on a case-by-case basis. For licenses issued on or after August 1, 1994, the Commission shall recover for the public a portion of the value of the public spectrum resource made available to [a pioneer's preference recipient] by requiring such person, as a condition for receipt of the license, to agree to pay a sum determined by--

(i) identifying the winning bids for the licenses that the Commission determines are most reasonably comparable in terms of bandwidth, scope of service area, usage restrictions, and other technical characteristics to the license awarded to such person, and excluding licenses that the Commission determines are subject to bidding anomalies due to the award of preferential treatment;

(ii) dividing each such winning bid by the population of its service area (hereinafter referred to as the per capita bid amount);

(iii) computing the average of the per capita bid amounts for the licenses identified under clause (i);

(iv) reducing such average amount by 15 percent; and

(v) multiplying the amount determined under clause (iv) by the population of the service area of the license obtained by such person.

(g) In services in which licenses are awarded by competitive bidding, a pioneer that qualifies as a designated entity will be eligible for installment payments under the same terms and conditions as other designated entities in that service, except that in all services the pioneer's payments must be completed within a five year period that will begin 30 days after the auction for comparable licenses has concluded or 30 days after the pioneer's license grant becomes final, whichever is later. A pioneer, like other applicants, will be required in its license application to certify and make the requisite demonstration that it is eligible for installments. Pioneers that are not eligible for installment payments must make the 85 percent payment specified in § 1.402(f) of this part within 30 days after the auction for comparable licenses has concluded or within 30 days after the license grant becomes final, whichever is later.

(h) An opportunity for review and verification of pioneer's preference requests by experts who are not Commission employees will be provided by the Commission. The Chief, Office of Engineering and Technology (OET) may select a panel of experts consisting of

persons who are knowledgeable about the specific technology set forth in a pioneer's preference request and who are neither employed by the Commission nor by any applicant seeking a pioneer's preference in the same or similar communications service. The panel of experts will generally be granted a period of up to 90 days, but no more than 180 days, to present their findings to the Commission. The Commission will generally establish, conduct, and seek the consensus of the panel pursuant to the Federal Advisory Committee Act, and will evaluate its recommendations in light of all the submissions and comments in the record. Panelists will have the authority to seek further information pertaining to preference requests and to perform field evaluations, as deemed appropriate by the Chief, OET.

(i) In order to qualify for a pioneer's preference in services in which licenses are awarded by competitive bidding, an applicant must demonstrate that the Commission's public rulemaking process inhibits it from capturing the economic rewards of its innovation unless it is granted a pioneer's preference license. The applicant must show that it may lose its intellectual property protection because of the Commission's public process; that the damage to its intellectual property is likely to be more significant than in other contexts, such as the patent process; and that the guarantee of a license is a significant factor in its ability to capture the rewards from its innovation. This demonstration will be required even if the Commission has not determined at the time a pioneer's preference request is filed whether assignments in the proposed service will be made by competitive bidding.

\* \* \* \* \*

(k) This section, along with the other pioneer's preference rules specified in §§ 0.241(f) and 5.207, will cease to be effective on September 30, 1998.

## **Appendix B -- Final Regulatory Flexibility Analysis**

Pursuant to 5 U.S.C. Section 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rule Making in this proceeding. Written comments on the proposals in the Further Notice, including the IRFA, were requested.

### **A. Need for and Objective of Rules:**

Our objective is to modify the pioneer's preference rules to address the directives of the GATT legislation and to make them better comport with our experience administering them.

### **B. Issues Raised by the Public in Response to the IRFA:**

No party specifically responded to the IRFA.

### **C. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent With Stated Objectives:**

We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary to ensure that the public receives the benefit of expeditious provision of new services and technologies. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities.